GTE Southwest Incorporated *and* Communications Workers of America, Local 6171. Case 16–CA–17012

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On October 23, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with relevant information. Unlike the judge, however, we find that the appropriate remedy for the violation is to order the Respondent to bargain with the Union concerning disclosure of the requested information, rather than to supply the information immediately.

In 1993, the Respondent began a testing procedure for the new position of customer care advocate (CCA). Part of the test was a "structured interview," in which a panel of supervisors posed a series of 11 hypothetical situations meant to measure the applicant's ability to deal with customers over the telephone, and graded the candidate's responses against a set of previously established model answers. The test took several weeks to develop, at a cost estimated at $13,000. Four sets of structured interview questions and model answers were developed; each set of questions and answers was intended to be used with numerous candidates.

Employee Mary Francis Reed took the CCA test but did not pass the structured interview portion. A grievance was filed on her behalf. To help process the grievance, the Union sent the Respondent a letter on August 8, 1994, which requested, inter alia, copies of the evaluations of Reed on the structured interview, a list of the items she passed and those she failed, and how the answers were rated. Specifically, the Union asked if any scale was used and, if so, for a copy and the evaluation criteria used. The Union requested that a person selected by the Union be allowed to view the test, and suggested someone from the national union or a subject matter expert selected by the national union.

By letter dated September 7, the Respondent furnished certain requested information, but advised the Union that, concerning the information requests described above, "GTE will not provide details regarding the grading criteria, copies of evaluations by panel members, or allow a viewing of the test/testing material. To do so would enhance the possibility of compromising or impairing the validity of the structured interview process." The Respondent never provided the disputed information. An attempt to work out a settlement agreement on the eve of the hearing was unsuccessful.

As the judge found, the Respondent concedes that the information requested was relevant to the Union's grievance processing needs. However, the Respondent contends that to provide the information to the Union without restriction would compromise the test and necessitate the time-consuming and costly development of a new structured interview test.

The judge found that the Respondent had not "fully" established its confidentiality defense. He noted that the parties have a long-established collective-bargaining relationship, and that the Union has handled other confidential information without violating the Respondent's trust. He also found that the Respondent had not made a good-faith attempt to accommodate the Union's need for the disputed information (or, in fact, any attempt at all until the eve of trial). He therefore ordered the Respondent to supply the information immediately. However, the judge also found that "the Respondent has . . . raised an element of the confidential nature of the information that it reasonably seeks to protect." Thus, he directed the Union not to disclose the information to anyone not involved in or necessary to the resolution of the grievance; persons entitled to access would include subject matter experts designated by the Union.[2]

In its exceptions, the Respondent contends that it established its confidentiality defense and attempted to accommodate the Union's information needs, both by attempting to reach a settlement before trial and by attaching to its posthearing brief a proposed settlement agreement. It argues that the judge erred in excluding the first proposed settlement agreement from evidence and by placing too much emphasis on the Union's reliability in protecting past confidences.

[1] We do not rely on the judge's statement that Gerald Okamoto, the Respondent's regional manager of employee and labor relations, admitted that he did not know of any instance when the Union had compromised confidential information. We find no support in the record for that statement.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel has moved to strike from the record attachment 2 to the Respondent's posthearing brief to the judge. As that attachment is not part of the record as defined in Sec. 102.45(b) of the Board's Rules and Regulations, we find it unnecessary to pass on the General Counsel's motion.

[2] GC Exhs. 2 and 3, which contain information the Respondent claims to be confidential, were placed under seal and subjected to a protective order by the judge.

The Respondent further argues that, even if there was a violation, the judge erred in giving the Union immediate access to the information. It contends that the only safeguard provided by the judge—the protective order—was exactly the sort that the Supreme Court found inadequate in *Detroit Edison Co. v. NLRB*.[3] It argues that the appropriate remedy is to order the parties to bargain over the conditions under which the information may be disclosed, as the Board did in other cases involving unions' requests for employers' proprietary information.[4]

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the testing information it sought in its August 8, 1994 letter. As the judge found, the information requested by the Union is relevant and necessary for the Union to process Reed's grievance, and the Respondent does not contend otherwise. The Respondent therefore was required either to provide the information promptly, as requested, or to attempt to accommodate its confidentiality concerns and the Union's need for the information.[5] It did neither. Although the Respondent did provide some of the information, as to which it raised no confidentiality concerns, it flatly refused to provide the rest and made no offer to seek an accommodation until the eve of trial, a year after the Union made its request.[6] A delay of that extent is plainly inconsistent with the Respondent's duty expeditiously to seek an accommodation because, even had the attempt to accommodate been successful, the Union still would have been deprived of necessary information for a year.[7]

We also find, however, that the Respondent has demonstrated that it has a legitimate and substantial interest in ensuring that the integrity of its testing materials not be compromised. As the judge found, the test took several weeks to develop and cost around $13,000. If the questions and model answers were disseminated among employees, the test would soon become worthless as an evaluation tool, and the Respondent would have to spend additional time and incur additional costs in order to replace it.[8]

In these circumstances, we do not agree with the judge that the Respondent should be ordered to furnish the requested information immediately. In similar cases, when unions have requested relevant information of a proprietary nature, the disclosure of which might compromise employers' important business interests or trade secrets, the Board has found it appropriate to give the parties an opportunity to bargain in good faith regarding conditions under which unions could receive needed information with appropriate safeguards for employers' legitimate proprietary interests.[9]

We find that approach appropriate here as well. We recognize, as the Board has in the past, that if the Respondent and the Union are unable to reach agreement on a method of protecting their respective interests, the parties may be back before us again. If there is a question as to whether the parties have bargained in good faith, we shall make that determination. If need be, we shall balance the Union's right of access to relevant information against the Respondent's confidentiality concerns, in accordance with the principles set forth in *Detroit Edison*. However, we believe that first allowing the parties an opportunity to resolve their differences best effectuates the Act's policy of maintaining industrial peace through the resolution of workplace disputes through collective bargaining.[10]

ORDER

The National Labor Relations Board orders that the Respondent, GTE Southwest Incorporated, Irving, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with Communications Workers of America, Local 6171 as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All nonsupervisory, nonprofessional, and nonadministrative employees within the Company; excluding all secretaries or clerical employees who handle confidential personnel information and who report directly to Company Officers, Department Heads, Vice President-General Managers, Division Managers, District Man-

[3] 440 U.S. 301 (1979).

[4] E.g., *Minnesota Mining & Mfg. Co*., 261 NLRB 27 (1982*); Borden Chemical*, 261 NLRB 64 (1982); and *General Dynamics Corp*., 268 NLRB 1432 (1984). Both *Minnesota Mining & Mfg. Co*. and *Borden Chemical* were enforced in *Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[5] *Tritac Corp*., 286 NLRB 522 (1987); *Pennsylvania Power Co*., 301 NLRB 1104, 1105 (1991).

[6] In this regard, the Respondent's conduct is distinguishable from that of the employer in *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139 (6th Cir. 1993). The employer in that case promptly made an offer of accommodation that the union refused.

We find no merit in the Respondent's argument that the Union made no attempt to accommodate or to guarantee confidentiality. The Respondent, not the Union, was the party that was required to seek accommodation. See, e.g., *Tritac Corp*., supra at 528; *Consolidation Coal Co*., 310 NLRB 109, 112 (1993).

[7] Consequently, the judge's failure to admit into evidence or to consider the Respondent's attempt at settlement made on the evening before the hearing and, a fortiori, his failure to consider the Respondent's attachment to its posthearing brief, were not improper.

[8] The Union's request concerned only one of the four alternative tests that the Respondent had developed. Thus, even if that particular test should be compromised, the Respondent still would have three other tests it could use. Obviously, however, in a large company like the Respondent, many employees will take these tests. Some will fail, and some of those, like Reed, will file grievances. The Respondent might quickly find itself with no usable tests left after a few such grievances unless unauthorized disclosure can be prevented.

[9] See, e.g., *Minnesota Mining & Mfg. Co*., supra at 32; *Borden Chemical*, supra at 65; and *General Dynamics Corp*., supra at 1433

[10] We shall also modify the judge's recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

agers, Division Department Managers and Customer Service Managers; employees of the Security Department, Legal Department, Human Resources Department, Safety Department, and Education and Training Department; employees in the General Office Payroll Section and Treasury; designated employees of the Offices Services section; guards and supervisors as defined in the Act.

By refusing or failing to furnish the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union regarding the Union's August 8, 1994 request for information concerning the structured interview test for the customer care advocate position, and thereafter comply with the terms of any agreement reached through such bargaining.

(b) Within 14 days after service by the Region, post at its facilities in Texas copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Communications Workers of America, Local 6171 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All nonsupervisory, nonprofessional, and nonadministrative employees within the Company; excluding all secretaries or clerical employees who handle confidential personnel information and who report directly to Company Officers, Department Heads, Vice President-General Managers, Division Managers, District Managers, Division Department Managers and Customer Service Managers; employees of the Security Department, Legal Department, Human Resources Department, Safety Department, and Education and Training Department; employees in the General Office Payroll Section and Treasury; designated employees of the Offices Services section; guards and supervisors as defined in the Act.

By refusing to furnish the Union with information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the Union regarding its August 8, 1994 request for information concerning the structured interview test for the customer care advocate position, and thereafter comply with the terms of any agreement reached through such bargaining.

GTE SOUTHWEST INCORPORATED

Edward B. Valverde, Esq., for the General Counsel.
Richard G. Stewart Jr., Esq., for the Respondent.
John R. Vasquez, Esq. (Van Os & Vasquez), for the Charging Party.

DECISION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Fort Worth, Texas, on August 10, 1995.[1] The Communications Workers of America, Local Union No. 6171 (the Union) has charged that GTE Southwest Incorporated (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA or the Act). The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

This case involves the Respondent's refusal to provide the Union with certain information about a job promotion test. At issue is the balancing of the Union's right to that information in order to represent employees in the grievance procedure and the Respondent's right to protection from the disclosure of the requested testing information. I find the Respondent did violate the Act as alleged, but that it is entitled to a limitation on the dissemination of the test material.

1. Background

The Union is the collective-bargaining representative for a unit of all nonsupervisory, nonprofessional, and nonadministrative employees at the Respondent's operations. The parties' collective-bargaining relationship dates from 1937.

In 1993, the Respondent created a testing procedure for a new position, Customer Care Advocate (CCA). Drafting the new test required a multiweek series of meetings and the concentrated efforts of several employees. The Respondent estimates the cost of inventing the test was approximately $13,000. Four sets of questions were created for part of the test called a structured interview. This element is administered by giving the applicant 11 scenarios that measure the employee's ability to deal with customers over the telephone. The applicant's responses are graded by three-panel members and their scores are then synthesized into the final grade.

Unit employee, Mary Francis Reed, took the test for the CCA job. Reed did not get a passing grade on the structured interview part of the examination. A grievance was filed on her behalf which ultimately progressed to the third step of the grievance procedure.

2. The Union's request for information

In order to process Reed's grievance the Union sent a letter to the Respondent on August 8. That letter, in pertinent part, requested the following information from the Respondent:

> 1. Copies of the evaluations made on the grievant during the structured interview test.
> 2. A list of the items that the grievant failed on the structured interview test.
> 3. A list of the items that the grievant passed on the structured interview test.
> 4. Specifically how are the answers rated? Is there any type of scale used? If so please provide a copy and the criteria used.
> . . . .
> We would also request a person selected by the Union be allowed to view the test. We would suggest someone from the National CWA or a subject-matter expert selected by the National CWA. [GC Exh. 6.]

3. The Respondent's reply to the information request

On September 7 Respondent's representative, T. J. Smith, replied to the Union's request giving answers to some of the questions posed. Additionally Smith stated:

> GTE will not provide details regarding the grading criteria, copies of evaluation by panel members, or allow a viewing of the test/testing material. To do so would enhance the possibility of compromising or impairing the validity of the structured interview process. [GC.Exh. 5.]

The Respondent did not thereafter supply the Union with any of the above noted information. Consequently, the Union filed the instant charge on October 11.

4. The parties' positions

During the hearing the Respondent conceded the relevancy of the information requested. However, the Respondent argues that to provide the test information or allow its viewing without restriction would compromise the integrity of the test for future use. This would result in creating a new structured interview test that would be time consuming and costly. In its brief the Respondent asserts the proper remedy to rectify its failure to provide the information be (1) a proposed settlement agreement attached to its brief, or, (2) that the parties be ordered to bargain in good faith in order to reach a mutually acceptable accommodation of their respective interests.

The General Counsel and the Union assert that the Respondent has clearly refused to supply the bargaining agent with relevant information needed to fulfill its grievance processing responsibilities. They argue the information should be provided forthwith.

5. Analysis of the information request

a. The general duty to supply information

An employer is required to provide a union relevant and necessary information that it asks for in the performance of its collective-bargaining responsibilities. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). However, a union's request does not automatically obligate the employer to supply all the information in the manner requested. The duty depends upon the circumstances of the particular case. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). As noted above, there is no dispute about the relevancy of the Union's request in this case, and I find that the requested information is relevant and necessary to the Union's processing of the Reed grievance.

b. The confidentiality issue

The Respondent raised the confidentiality issue in its September 7 letter by stating the viability of the test will be compromised if unauthorized persons are given access to the materials. The party asserting confidentiality bears the burden of proof in sustaining that defense. *Howard University*, 290 NLRB 1006, 1007 (1988). Where the employer has a "legitimate and substantial" interest in not providing the information it must make a reasonable and good-faith effort to accommodate the Union's need for the relevant information. *Detroit Edison Co. v. NLRB*, supra. At the trial the parties were given

[1] All subsequent dates refer to 1994 unless otherwise indicated.

time to attempt to settle this dispute. These private settlement discussions were not fruitful. There is no other significant evidence the Respondent attempted to accommodate the Union's request for the information. *Island Creek Coal Co*., 289 NLRB 851 fn. 1 (1988); Fed.R.Evid. 408.

The Union has historically been privy to confidential information provided by the Respondent. The Respondent's agent, regional manager—labor and employee relations, Gerald Okamoto, admitted that he knew of no instance when the Union had compromised the confidentiality of information it had received. Union Representative William L. Davis confirmed the past practice between the parties of the Union being provided confidential information. Davis testified that the Union had never received any complaints from the Respondent about its handling of confidential information.

As a factor in examining a confidentiality defense the Board considers the reliability of a union in protecting confidential information. *Pertec Computer Corp*., 284 NLRB 810, 811 (1987). Where the evidence shows there is no problem in this regard the Board has ordered the production of the information with reasonable restrictions on disclosure. *People Care*, 299 NLRB 875, 876 (1990); *Howard University*, supra.

The parties have a long-term relationship and the Union has handled confidential information with trustworthiness. I find that the Union can be expected to reasonably protect the test information it requests from unauthorized disclosure. Moreover, there is a lack of reasonable and good-faith accommodation on the part of the Respondent to attempt to provide the information to the Union. In sum, I find the Respondent has not met its burden of fully establishing its confidentiality defense. I find, therefore, that the Respondent has violated Section 8(a)(1) and (5) of the Act by not giving the Union the relevant information it seeks.

The appropriate remedy in this case shall include the Union's right to immediate access to the information requested in its August 8 letter. The Respondent has, however, raised an element of the confidential nature of the information that it reasonably seeks to protect. Thus, the Union shall be directed not to disclose the information to any persons who are not involved in or necessary to the resolution of the Reed grievance. *Howard University*, supra. Persons who are entitled to access shall include subject-matter experts designated by the Union.

6. Protective order

At the hearing Respondent was granted a limited protective order relative to two documents that had been subpoenaed by the General Counsel. Section 102.39, Board's Rules and Regulations; Fed.R.Civ.P. 26(c). The order directed that the Technical Report (GC Exh. 2) and the Summary Rating Form (GC Exh. 3) were to be limited to the use of counsel during the hearing, were not to be publicly disclosed, and if any questions about their handling arose they were to be placed before me for ruling. I issued a written Order that required these two exhibits be placed under seal by the court reporter and noted the disposition of these exhibits would be treated in my decision.

By this decision the Union has now been granted access to the test materials. No party objected to the protective order. In order to protect the above noted exhibits from being generally disclosed they shall remain sealed. See discussion, *United Parcel Service*, 304 NLRB 693, 694 (1991). To the extent that any parts of these exhibits are otherwise contained in the record those portions are not effected by the protective order.

CONCLUSIONS OF LAW

1. GTE Southwest Incorporated is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America, Local 6171 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of certain employees in the following appropriate unit:

> All nonsupervisory, nonprofessional, and nonadministrative employees within the Company; excluding all secretaries or clerical employees who handle confidential personnel information and who report directly to Company Officers, Department Heads, Vice President-General Managers, Division Managers, District Managers, Division Department Managers and Customer Service Managers; employees of the Security Department, Legal Department, Human Resources Department, Safety Department, and Education and Training Department; employees in the General Office Payroll Section and Treasury; designated employees of the Offices Services section; guards and supervisors as defined in the Act.

4. By refusing to furnish the Union with relevant and necessary information of test documents as set forth in the Union's August 8, 1994 letter, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]